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Analysis First-tier Tribunal Rule 18: collective law?

Where two or more appeals before the First-tier Tribunal (FTT) raise a related issue, the Tribunal may nominate one of them as a 'lead case' and stay the others. The FTT's decision in the lead case will bind the related cases. This raises various risks for taxpayers. HMRC may argue cases are related even when they are not, or seek to stay one case in favour of another where the taxpayer's position is weaker. Perhaps two-thirds of the entire FTT tax caseload is being held over behind lead cases of one kind or another and that may be hindering swift access to justice.

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Where two or more appeals before the First-tier Tribunal (FTT) raise a common or related issue of law or fact, Rule 18 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules, SI 2009/283, gives the Tribunal power to nominate one of them as a 'lead case' and to stay the others ('related cases'). The FTT's decision in the lead case will bind the related cases subject to a right of objection once that decision is known. This goes much further than promoting the FTT temporarily to the status of a court of superior jurisdiction, whose decisions are binding precedents of law subject to the normal rules. It makes the decision of the lead case, both on fact and law, the decision in the related cases to the entire exclusion of any further process.

This is distinct from power within Rule 5 (general case management) to nominate a lead case without its decision being directly binding upon related cases. e Rule 5 power is just an enhanced listing power of the kind which the High Court used to operate.

The purposes of Rule 18

The purposes of the Rule are plain and irreproachable. It seeks to reduce the cost and increase the speed of justice by avoiding multiple hearings of the same point while improving its quality (by eliminating capricious differences of outcome). Although it originated as a tax rule it is not limited to the Tax Chamber of the FTT and appears in some of the other chamber rulebooks as well.

In practice:

- HMRC may use it to exploit its better knowledge of what is in the pipeline, by advancing test cases which it is likely to win; and
- scheme promoters, or groups of taxpayers, may be expected to use it to defend or bring speculative proceedings on a shared-costs basis.

Origin and nature

Rule 18 appears to have been loosely inspired by the Group Litigation Order (GLO) introduced for mainstream litigation in 2000. However, a GLO is a mechanism for what amounts to a giant consolidation of claims. Tax 'appellants' are more commonly in the situation of defendants than of claimants and Rule 18 operates more as a mandatory representative action than as a consolidation. As such, it entirely lacks the detailed (though still insufficient) provision made in GLO for costs-sharing, representation, appeals and other practical matters normally arising in a collective litigation scenario.

Rule 18 originally appeared in 2002 and was limited to social security contribution appeals. It was not used at all until 2005. When re-enacted in 2009, with wider scope, many of the protections which applied to the precursor rule were stripped.

In the 2002 version:

- only the Presiding Special Commissioner had authority to operate it – now any FTT judge may;
- the PSC did not have to stay the related cases; now they must be stayed;
- the PSC could not make a lead case decision without hearing all the affected parties first; now a direction may be made and only notified to the parties affected post facto, leaving it to them to apply for a new direction setting aside the first; and
- the PSC was required to make an ante facto ruling as to how far the lead case decision was to bind the related cases, and to give directions for the hearing of the remaining issues; now the lead case binds automatically (subject to prompt protest) and there is no express recognition that the related issues may not be determinative of the related case.

> The Chief objection to the Rule may be its failure to achieve swifter access to justice

Scope of the Rule

The Rule only applies to extant cases, those which have been started before the FTT but not decided (and not therefore to appeals which have been made but not yet notified). There is no express requirement that the lead case should be further advanced than the related cases which it is to bind. Nor is there any express prohibition upon a party seeking to rescind the original direction in favour of a new lead case.

> In May 2011 the Judicial Communications Office estimated that two-thirds of the entire FTT tax caseload was being held over behind lead cases of one kind or another

In practice HMRC seeks to widen this by arguing that it is appropriate to stay cases where it has reason to believe that a suitable lead case will in due course be forthcoming, even though it has not yet been notified. The FTT has shown itself receptive to this argument, even in the absence of any information about the expected appeals, reasoning that it would be hard on an earlier appellant if it were allowed to spend substantial costs only later to be stayed in favour of a subsequent lead case.

But on this entirely conjectural argument it is difficult to see how any appeal could ever move forwards, if HMRC does not wish it. It will almost always be a misuse of the power to stay if the stay is sought on the ground that a suitable lead case will emerge subsequently. There is both a jurisdictional and a practical reason for this. It is doubtful that the FTT has jurisdiction to order a stay of an existing appeal in support of a lead case order which it currently has no jurisdiction to make (because the putative lead case is not yet before the Tribunal). Also, to stay an existing appeal in favour of an entirely speculative lead case offends the emphasis on access to justice with reasonable despatch.

Conversely there seems no reason why, once a lead case has been nominated, HMRC should not seek to extend the direction so as to make fresh appeals 'related', even though they were not extant when the lead case direction was originally given.

Connecting factors

The shared issues need not be 'common'. It is enough that they are 'related'. HMRC appear to think that this need mean no more than having some similar features, in their view. Even more difficult than the extent of the relationship is the question of what evidence is required to demonstrate it, especially when the alleged link is one of fact. HMRC's *Appeals Reviews and Tribunals Guidance Manual* at one time stated 'officers should have some evidence and be able to state the common issue' – hardly a demanding interpretation.

The obvious problem is that interlocutory proceedings are incapable of finding facts except upon a provisional basis; when they take place at the very start of a proceeding, any finding is likely to be very provisional.

A lead case order will normally take place before Statement of Case; if it is later than that there is not much point in having it; but having it so early poses a real risk that a supposedly related issue of fact will turn out to be nothing of the kind. HMRC has been known to claim that taxpayer confidentiality prevents them from divulging the facts which (in HMRC's view) establish the connecting link. The *Manual*, more helpfully, acknowledges that CRCA 2005 (s 18(2)) now permits them to do so,

though possibly on a redacted basis to preserve anonymity (ARTG8559).

Conduct of lead case

The rule makes no provision for followers to participate in the lead case (in contrast to the GLO arrangements in the High Court). It seems to be assumed that any related finding of fact or ruling of law will be arrived at without the follower having any opportunity to test HMRC's evidence, or adduce evidence of his own, or make submissions. Presumably any application by a follower to join the lead case as a third party under Rule 9 (on the ground that he or she is interested in the outcome) will be opposed on the ground that it undermines the benefits which the lead case direction is supposed to deliver. A follower (and his advisers) could attend the hearing of the lead case as members of the public but that appears to be the limit of what is available.

Grounds for non-application

The Rule provides the parties to each related appeal with a brief opportunity to challenge the application of the lead case decision to their own case, on the ground that the lead case decision 'does not apply to, and is not binding on the parties to [the related case]'. It seems that HMRC can seek a disapplication order even if it was the party which proposed a lead case order in the first place. There is no guidance from case-law as to what a party must show to obtain such an order and it is very difficult to see how this jurisdiction will work. Normally when a litigant seeks to argue that a precedent is distinguishable he or she starts from the position that the facts of his or her own case have been pleaded. Here, unless the facts have been sufficiently agreed it may be impossible to say whether they are distinguishable.

Some problems with the Rule

The brevity of the Rule immediately gives rise to uncertainties:

- May a party to a related case challenge the direction at the outset, by applying for an inconsistent direction? (Presumably so).
- If such a challenge is unsuccessful, may the party appeal it? (Presumably, but only if the appeal can be framed as being upon a point of law: probably not too difficult).
- Are the related cases wholly stayed or may they proceed in relation to unrelated issues?
- Is the binding 'decision' the final determination only or do interlocutory decisions in the lead case also bind? (The Rule cannot include every interlocutory decision because many would have no application to the related case, but it might include some: for example, a decision to divide the lead case into preliminary and subsequent issues, to exclude expert evidence, etc).
- What does 'bind' actually mean? the concept of a case being 'bound' by an earlier case is familiar to everyone but this does not normally displace the hearing of the latter case altogether. e intention of Rule 18 seems to be that the decision in the lead case is directly applicable to the related cases, in the same way that a GLO decision in the High Court is directly applicable. A GLO is however a different creature from a 'lead case', the GLO group are all parties to the litigation and the decision addresses the circumstances of the group, not just one member of the group.
- Does this mean that the Rule 18 jurisdiction is in effect limited to cases in which the common/related issue is the only live issue in the related cases?

Costs

> HMRC may use it to exploit its better knowledge of what is in the pipeline

If the related appeals, or at least the lead case, are allocated to the complex track, costs would normally follow the event. Even in a standard appeal the leader will have his own costs to bear. It is unclear whether the FTT has power to make any allocation as between the leader and the followers, or whether the followers can claim costs against HMRC in the event of victory (and vice versa); especially if the followers have not been 'tracked'.

Appeals

Presumably the followers must have the same right of appeal (with permission) as if their case had been determined in the usual way. Yet it is not entirely easy to envisage B appealing A's decision, in circumstances where it is probable that neither B nor his advisers were even present at first instance. Presumably the appeal will in form be against the decision as applied to B's appeal but it may have two strands: first, that the substantive decision was wrong in law even as against A, and/or second, that the procedural decision, to reject B's application that A's decision should not be applied to himself, was wrong on B's true facts. Since A may also be appealing (and

C and D and E etc), appeals may become very confusing. (There is no Rule 18 in the Upper Tribunal, so there can be no 'lead' appeal.)

The Practical outcome (so far)

In May 2011 the Judicial Communications Office estimated that two-thirds of the entire FTT tax caseload was being held over behind lead cases of one kind or another (not necessarily just formal lead cases under Rule 18). Like all Tribunal statistics, it is very difficult to know what is really being measured but that is still a disturbing figure, given that the new Rules are supposed to deliver access to swifter justice.

The future

There seem to be two broad alternatives for the future of Rule 18. In the first ('voluntary') scenario, all concerned will be very cautious to limit the use of the Rule to circumstances in which all parties agree its application. In that case, most of the problems will disappear. In the second ('coercive') scenario, serious dislocations, anomalies and injustices are likely to arise, mainly on the taxpayer side.

Certain statements in the HMRC *Manual* suggest sympathy for the voluntary scenario but this is not how matters appear to be going. On the coercive scenario, one question is whether the access to justice being offered to unwilling followers falls short of the requirements of Article 6 of the Human Rights Convention.

With a backlog of 130,000 cases of its own, the ECHR may be sympathetic to anything which attempts to slash pending lists. But the chief objection to the Rule may be its failure to achieve that very thing.

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